State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 9, 2016
PR 16-48

John Farraher, Esquire

Re: Providence Journal v. Pawtucket Police Department

Dear Attorney Farraher:

The investigation into your Access to Public Records Act ("APRA") complaint filed on behalf of your client, LMG Rhode Island Holdings, LLC, publisher of The Providence Journal, against the Pawtucket Police Department ("Police Department") is complete. By email correspondence dated June 9, 2016, you alleged the Police Department violated the APRA when it denied The Providence Journal's March 11, 2016 APRA request, which sought:

> "a copy of the police report from Feb. 11 on the murder-suicide of [Mr. and Mrs. Doe] and Feb. 4 report made by [Ms. Doe] alleging threats by [Mr. Doe]."

In response to your complaint, we received a substantive response from the City's Solicitor, Frank J. Milos, Jr. Solicitor Milos states, in pertinent part:

> "The Police Department determined that the Journal was seeking a copy of police reports numbered 16-841-OF and 16-687-OF. * * * The City determined that the requested reports were offense reports regarding incidents that did not result in an arrest. As a result, the City determined that public disclosure of the report[s] could reasonably be expected to constitute an unwarranted invasion of personal privacy.
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> In support of its Complaint, the Journal states that the City 'did not provide even a general description of the information contained in the requested reports, making it impossible to assess the scope and nature of the 'privacy' rights he purports to protect. Moreover, [the Journal contends the City] fails to explain why – even if the reports contained protectable information – redacted copies of the requested materials could not have been produced.'

The City is uncertain exactly what type of 'general description of the information contained in the requested reports' the Journal would have expected to receive in the City's response to its APRA request. Based upon the wording of both the initial APRA request and subsequently the underlying Complaint, it seems clear that the Journal was generally aware of the subject matter of both the requested reports and that the latter report contained information regarding the Police Department's investigation into the tragic deaths (i.e., murder-suicide) * * * . In addition, the City was of the belief that the Journal was seeking unredacted copies of the reports in question. However, based on the fact that the murder-suicide incident had been heavily reported and that the specific identities of the participants were within the public's knowledge, the City does not believe that release of even redacted reports would have been an appropriate remedy in this matter. [ ].

In further support of its Complaint, the Journal also states that because both [Mr. and Mrs. Doe] are deceased, any personal privacy concerns have been eliminated (or at a minimum, substantially reduced) and that but for the murder-suicide, it is reasonable to believe that [Mr. Doe] would have been arrested, making the reports 'public' within the meaning of the APRA, the City concedes that the Journal raises two valid points. The City is mindful that generally, the right of privacy dies with the person. In addition, if the incident in question had not resulted in a 'murder-suicide,' it appears likely that [Mr. Doe], at the very least, would have been arrested.

* * *

Lastly, the Journal states that '[d]omestic violence and the steps taken by law enforcement and other public agencies to protect citizens from such abuse are clearly of significant public interest' and further states that [t]he reasons supporting the 'presumption' that reports that do not result in an arrest are exempt from production simply do not exist here.' Certainly, after prosecuting cases involving domestic violence for over twenty years, [Solicitor Frank J. Milos, Jr.] agrees that steps taken by the Pawtucket Police Department to protect its citizens from domestic abuse are of significant public interest. However, the City contends that that does not necessarily mean that the police reports in question are public records. Respectfully, in its initial APRA request, the Journal does not assert a 'public interest' as recognized through the APRA. The Journal now in its Complaint seeks to assert the aforementioned public interest, but offers little, if any, evidence in support of how or why public disclosure of the reports would shed light [on] how government operates and/or how the Pawtucket Police Department might better protect its citizens from domestic abuse."

We acknowledge your rebuttal.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Police Department violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-3(a). The APRA's stated purpose is both "to facilitate public access to public records" and "to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-1. Among the APRA exemptions is R.I. Gen. Laws § 38-2-2(4)(i)(D), which exempts from disclosure "[a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency," provided the disclosure of such records "(c) could reasonably be expected to constitute an unwarranted invasion of personal privacy." The United States Supreme Court, the Rhode Island Supreme Court, and this Department have exhaustively examined R.I. Gen. Laws § 38-2-2(4)(i)(D)(c), or its Freedom of Information Act (FOIA) counterpart, Exemption 7(C).

In this case, the Providence Journal seeks reports concerning the investigation of a specific murder-suicide and investigative reports preceding this incident. This is not the first time this Department has confronted a request seeking a law enforcement's reports concerning its investigation of a suicide. Over a decade ago, this Department examined and determined that a law enforcement report pertaining to a particular individual's suicide was exempt from public disclosure based on the surviving family member's privacy rights. See Casey v. Johnston Police Department, PR 02-02. Although the decedent maintained no privacy interests, we explained in Casey that "our examination of the requested documents reveals that the instant records describe the suicide scene, sometimes in graphic detail, as well as the other circumstances attendant to suicide." For this reason, we concluded the surviving family members' privacy interests outweighed the public interest in disclosure. Faced with a similar situation in this case, we find no reason to reach a different result.

The United States Supreme Court has made clear that the FOIA:

> focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose,

> however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency's own conduct. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481-82 (1989).[1]

The Court further explained that:

> the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen. Id. at 774-75, 109 S.Ct. at 1482 (emphases in original).

The plain language of R.I. Gen. Laws § 38-2-2(4)(i)(D)(c) contemplates a "balancing test" whereby the "public interest" in disclosure is weighed against any "privacy interest." Consequently, we must consider the "public interest" versus the "privacy interest" to determine whether the disclosure of the requested records, in whole or in part, "could reasonably be expected to constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-2(4)(i)(D)(c). The APRA further provides, in pertinent part, that "[a]ny reasonably segregable portion of a public record excluded by subdivision 38-2-2(4) shall be available for public inspection after the deletion of the information which is the basis of the exclusion." See R.I. Gen. Laws § 38-2-3(b).

Here, we begin with the privacy interest. It is beyond debate that the deceased individuals identified in the requested reports have no privacy interest as "the right to privacy dies with the person." Clift v. Narragansett Television L.P., 688 A.2d 805, 814 (R.I. 1996). While your correspondences largely conclude any privacy interest consideration at this stage, our inquiry does not end and, consistent with case law, we examine whether any other individuals have a privacy interest.

The United States Supreme Court has considered this precise issue and has expressly determined that when balancing the privacy interest versus the public interest, the privacy interest of the decedent's family must be considered. See National Archives and Records Administration v. Favish, 541 U.S. 157, 171 (2004). See The Providence Journal v. Department of Public Safety, 136 A.3d 1168, 1175 (R.I. 2016)(adopting Favish standard). This is perhaps a greater

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[1] The Rhode Island Supreme Court has stated that "[b]ecause [the] APRA generally mirrors the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1977), we look to federal case law interpreting FOIA to assist in our interpretation of the APRA." Teacher's Alliance Local No. 920 v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

consideration in this case since, unlike Favish, the requested reports identify surviving family members. Even Rhode Island case law appears to recognize some measure of extension of privacy interests to the family of a decedent. See Clift, 688 A.2d at 815 ("[T]he reporter's conversation with the decedent did not, however, rise to the level of an actionable intrusion into the Clift's family's seclusion."). Furthermore, as noted supra, this Department has previously determined that law enforcement records pertaining to a particular individual's suicide were exempt from public disclosure based on the surviving family member's privacy rights. See Casey, PR 02-02. As such, based on this precedent and the plain language of the APRA, we must examine the personal privacy rights that the surviving family members, as well as those identified in the reports, have in the contents of the investigation records.

There can be little doubt that these reports – in an unredacted manner – implicate significant privacy interests of the surviving family members. In your complaint, you write that "even if the reports contained protectable information," the City failed to provide redacted reports. While we shall address redaction, infra, at this stage it suffices that your suggestion that the City violated the APRA by not redacting the requested reports implicitly acknowledges the sufficiency of our conclusion that significant privacy interests are implicated through the unredacted disclosure of the requested documents. Regardless, while Favish examined photographs of a suicide whereas this case concerns investigative reports of a murder/suicide – Favish's recognition of a "well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law" is instructive to this case. Favish, 541 U.S. at 168. See also id. at 167 ("We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes.").

In your APRA complaint you contend that "the City fails to explain why – even if the reports contained protectable information – redacted copies of the requested materials could not have been produced." Having reviewed the requested documents, in camera, as well as case law, we disagree. As explained above, the privacy interests implicated belong not to the decedent, but to the decedents' families. Most importantly, you seek reports concerning only one specific incident, and you identify those involved by name. As the Rhode Island Supreme Court explained in another situation upholding the denial of records where a requester sought documents pertaining to one identifiable person/incident, "[e]ven if all references to proper names were deleted, the principal's identity would be abundantly clear from the entire context of the report." Brady, 556 A.2d at 559. Brady applies squarely to your redaction argument. In reaching this conclusion is not lost upon this Department that the nature of the documents requested contain graphic and emotional content for surviving family members and sometimes vividly describes the nature, method, and motivation for the murder/suicide. See Casey, PR 02-02 ("our examination of the requested documents reveals that the instant records describe the suicide scene, sometimes in graphic detail, as well as the other circumstances attendant to the suicide"). The privacy interest in the disclosure of these reports is significant. See Favish, 541 U.S. at 170 ("Our holding ensures that the privacy interests of surviving family members would

allow the Government to deny these gruesome requests in appropriate cases.")(suicide photos); New York Times Co. v. NASA, 782 F.Supp. 628, 631, 632 (D.D.C. 1991)(sustaining families' privacy claim with respect to an audiotape of the Space Shuttle Challenger astronauts last words because "[e]xposure to the voice of a beloved family member immediately prior to that family member's death . . . would cause the Challenger families pain" and inflict "a disruption [to] their peace of mind every time a portion of the tape is played within their hearing"). Having examined the "privacy interest," we next address the "public interest."

In Favish, the United States Supreme Court considered a public interest argument with respect to certain photographs depicting the condition of a decedent's body at the suicide scene. In so doing, the Court stated that "[t]he term 'unwarranted' requires us to balance the * * * privacy interest against the public interest in disclosure." Favish, 541 U.S. at 171. To effectuate this balance, the Court provided a two-step process by which a citizen must prove that it is entitled to disclosure of the records. Specifically, the Court provided that: "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted." Id. at 172.

Favish continued to explain that:

> "[W]here there is a privacy interest * * * and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Id. at 174. See Providence Journal, 136 A.3d at 1175 (adopting Favish standard).

Balanced against this significant privacy interest, see supra, we must consider the public interest in disclosure. In your rebuttal, you acknowledge the Favish standard, argue that The Providence Journal has satisfied this standard, and identify the public interest sought to be advanced: "domestic violence and the steps taken by law enforcement and other public agencies to protect citizens from such abuse are clearly of significant public interest." You further proffer that this is "plainly not a case where ProJo is seeking information for its own sake."

Assuming, arguendo, that we agree with your point that "domestic violence and the steps taken by law enforcement and other public agencies to protect citizens from such abuse are clearly of significant public interest," we find little to no "public interest" – as you have described it – regarding the murder-suicide investigative reports. These reports "describe the suicide [and murder] scene, sometimes in graphic detail, as well as the other circumstances attendant to the suicide [and murder]." Casey, PR 02-02. There is little to no evidence that the disclosure of these investigative reports "is likely to advance that interest," namely, the steps taken by law

enforcement to protect victims of domestic violence. Favish, 542 U.S. at 172. Rather, these reports document the murder-suicide scene and the investigation into this incident.

With respect to the pre-murder suicide report(s) concerning alleged threats, respectfully, we also fail to see how the disclosure of these report(s) would shed light on "[d]omestic violence and the steps taken by law enforcement and other public agencies to protect citizens from such abuse." While our discussion on this point is somewhat hindered by our inability to discuss the content of non-public documents, it suffices that "[a]ny information provided by the investigatory documents in this isolated incident would provide facts in relation to just that – a single incident" and "would not provide the public with any indication of how this law is enforced generally." Providence Journal, 136 A.3d at 1179, n.6. See also Boyd v. Criminal Division of the United States Department of Justice, 475 F.3d 381, 388 (D.C. Cir. 2007)("a single instance of a Brady violation in Boyd's case would not suffice to show a pattern of government wrongdoing as could overcome the significant privacy interest at stake"); Hunt v. Federal Bureau of Investigation, 972 F.2d 286, 288-89 (9th Cir. 1992)(contrasting a FOIA request for a single investigatory file with requests for numerous disciplinary files and concluding that "[t]he single file * * * will not shed light on whether all such FBI investigations are comprehensive.").

Lastly, you contend that the public interest is advanced – and that The Providence Journal is not seeking this information for its "own sake" – because The Providence Journal is "seeking the information to report on a topic that is admittedly of significant public interest," i.e., domestic violence. In Reporters Committee, the United States Supreme Court examined a similar asserted public interest where a "rap sheet" of a particular person who had interactions with a Congressman was at issue. The Court acknowledged that:

> "[c]onceivably [the] rap sheet would provide details to include in a news story, but, in itself, this is not kind of public interest for which Congress enacted the FOIA. In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed." Reporters Committee, 489 U.S. at 774.

Even if we assume you satisfied the Favish standard and presented evidence that disclosure would advance some public interest, case law and our in camera review makes clear that in this case, and based upon the evidence presented, the privacy interests outweigh the public interest and no reasonable segregable portion can be provided. See R.I. Gen. Laws § 38-2-3(b); Providence Journal, 136 A.3d at 1178 ("In the case of the documents developed by law enforcement in the investigation of a private individual, the privacy interest is considerable and should not be easily displaced absent a particularly noteworthy public interest."). See also

Favish, 541 U.S. at 166 ("[i]n this class of cases where the subject of the documents 'is a private citizen,' 'the privacy interest . . . is at its apex'").

Two last points. First, both parties devote some time to arguing that had the murder-suicide not occurred, Mr. Doe would likely have been arrested and such arrest documents would have been public records. See R.I. Gen. Laws § 38-2-2(4)(i)(D). Respectfully, in this finding – and in all our findings – we simply deal with the documents that do exist, and not those that would have existed but for certain circumstances. In making this argument, it is noteworthy that neither party fully extends their argument – had the murder-suicide not occurred, the bulk of the requested documents – those concerning the murder-suicide – would have never been created. Second, we stress that this finding should not be interpreted as precedent that the type of documents requested in this case may never be public records. Rather, this finding simply stands for the proposition that on the facts presented in this case, the privacy interest outweighs the public interest and these documents are not public records.

For all of these reasons, we find that the Police Department did not violate the APRA.

Although the Attorney General will not file suit in this matter, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised we are closing our file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Lisa Pinsonneault
Special Assistant Attorney General

LP/kr

Cc: Frank Milos, Esq.